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May 18, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Opposition to Petition for Leave to Amend and Amendment."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

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OPPOSITION TO PETITION FOR LEAVE TO AMEND AND AMENDMENT

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this "Opposition to Petition for Leave to Amend and Amendment." On May 9, 1994, David A. Ringer ("Ringer") filed a "Petition for Leave to Amend and Amendment." Therein, Ringer seeks to amend his application to specify a new tower site. The amendment results from the loss of the tower site initially specified by Ringer in his application.

ORA requests leave to file this opposition. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because Ringer's amendment raises basic qualifying and non-integration matters, an opposition is appropriate. In support of its opposition, ORA offers the following comments.

Under established Commission precedent, a post-designation amendment can be accepted only if "good cause" is demonstrated. This includes demonstrating that acceptance of the amendment would not require the specification of new issues or require additional hearings. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970). As noted below, Ringer's petition for leave to amend utterly fails to meet these Commission requirements.

In his petition for leave to amend and amendment, Ringer states that the proposed tower site initially specified in his application has been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. However, Ringer fails to disclose in his petition when he was first aware that the tower site was sold. In an attached declaration, dated May 6, 1994, Ringer only states that he received a March 2, 1994, letter from Mid-Ohio indicating that the site had been sold. The letter does not state when the site was sold and Ringer is silent as to whether he was aware of the sale before receiving the letter from Mid-Ohio.

It is necessary to know if Ringer was aware before receiving the March 2, 1994, letter from Mid-Ohio that the tower site was sold in order to determine whether he acted with "due diligence" in obtaining a new tower site. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990);

Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982). Because Ringer fails to disclose this required information, his petition for leave to amend must be denied and his amendment rejected.

The March 2, 1994, letter submitted by Ringer with his petition for leave to amend demonstrates that he never had "reasonable assurance" from Mid-Ohio of his proposed tower site. The letter states in pertinent part that Mid-Ohio had only been "willing to negotiate" with Ringer a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, para. 9. More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd. 1989). Accordingly, Ringer fails to demonstrate in his petition for leave to amend that he had "reasonable assurance" of his proposed tower site at the time of initially filing his application. This requires denial of his petition for leave to amend and rejection of his amendment.

Ringer's petition for leave to amend must also be denied and his amendment rejected because he does not have "reasonable assurance" of the new proposed tower site. In an attached letter, dated April 22, 1994, from Station WOSU, only a willingness to "enter into negotiations" was expressed. As noted above, this does not meet Commission requirements. Progressive Communications, Inc., more than a vague "willingness to deal" in the future is needed to constitute "reasonable assurance."

Ringer's petition for leave to amend must be denied and his amendment rejected because its acceptance would require the specification of a financial

qualifications issue. Under the initially specified tower site, Ringer's cost estimates were \$201,880. Under the new tower site, his cost estimates total \$430,224.

Although Ringer's cost estimates will more than double, he fails to submit in his amendment any documentation of his current ability to fund this increased amount. Without such documentation, it can not be determined that Ringer is financially qualified. Dean F. Aubol, 6 FCC Rcd 4117, para. 3 (MMB 1991), where cost estimates exceed the amount of available committed funds, a financial qualifications issue is raised.

Ringer's petition for leave to amend must be denied and his amendment rejected because he has improperly attempted to revise his cost estimates with respect to matters unrelated to the change in tower site. In his initial cost estimates, Ringer failed to include payroll taxes (Dep. Tr. 60). ORA raised this matter in a motion to enlarge the issues, filed August 18, 1993. Exceptions to the denial of the motion were made by ORA. See, ORA's exceptions, para. 44, filed December 20, 1993.

In his revised cost estimates, Ringer now includes the disputed payroll taxes. See, Ringer Amendment, Attachment C. However, Commission policy will not allow Ringer to now revise this aspect of his cost estimates without a showing of "good cause." Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991). Ringer makes no attempt to submit such a showing.

Ringer's revised cost estimates are also deficient in the same respect as his initial estimates. Those estimates failed to include any costs for programming. Columbus Broadcasting Corp., 3 FCC Rcd 5480, 5481, para. 7 (MMB 1991), incomplete cost estimates raise financial qualifications issue. Although Ringer claims that programming can be obtained free from a satellite service, no inquiry was made as to its availability (Dep. Tr. 28, 59). This matter was raised in a motion to enlarge the issues, filed August 18, 1993. ORA excepted to the denial of the motion. See, ORA exceptions, para. 44, filed December 20, 1993.

Ringer's amendment fails to include any documentation or demonstration that such free programming is available. Accordingly, if the amendment is accepted, the specification of a financial qualifications issue would be required.

Ringer's petition for leave to amend must be denied and his amendment rejected because it raises technical and engineering issues. Although Ringer proposes to operate at an effective radiated power of 6 kw, his cost estimates indicate that only a 5 kw transmitter will be used. See, Ringer Amendment, Attachment C, Allied Harris proposal, p. 2. Ringer fails to explain how his transmitter would be modified to operate at 6 kw.

Ringer's petition for leave to amend must be denied and his amendment rejected because he proposes a tower site which is short-spaced to Station WTTF, Tiffin, Ohio, and to Station WPAY, Portsmouth, Ohio. Commission policy proscribes an applicant in a comparative hearing from proposing a short-spaced tower site if a fully-spaced site is available and suitable. North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985). ORA proposes a fully-spaced tower site which is available and suitable.

Although Section 73.215 permits the use of directional antennas for short-spaced tower sites, their use is allowed only where there are no available and suitable fully-spaced tower sites. MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). As previously noted, a fully-spaced site is available and suitable for use.

Even if Commission policy allowed Ringer to use a short-spaced tower site pursuant to Section 73.215, he concedes that his proposal otherwise violates that provision. See, Ringer Amendment, Exhibit 2, Engineering Statement, Part 2.0, Allocation Considerations. Therein, Ringer notes that Section 73.215, which provides for contour protection, requires that there be no overlap between WTTF's 54 dBu 50% contour and the proposed 48 dBu 10% contour. However, as admitted by Ringer, there would be such prohibited overlap. See, Appendix, attached hereto.

In order to skirt this admitted rule violation, Ringer attempts to invoke the "grandfathering" provisions of Section 73.213 (c). However, Ringer fails to explain how that provision would be applicable. Indeed, Section 73.213 (c)

explicitly prohibits Ringer from invoking that provision, which states that it can not be used by applicants filing pursuant to Section 73.215.

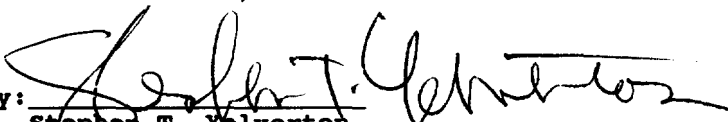
Moreover, Section 73.213 (c)(1) limits use of that provision to facilities with no more than 3 kw ERP in any direction. Ringer proposes an ERP of 6 kw. Section 73.213 (c)(2), which applies to facilities with more than 3 kw ERP, requires an exhibit demonstrating the consent of Station WTTF. Ringer fails to submit such consent. Section 73.213 (c)(2) also explicitly requires that no fully-spaced tower site be available. As previously noted, a fully-spaced site is available and suitable.

Accordingly, Ringer's new proposed tower site and engineering proposal on its face fails to comply with either Section 73.213 or 73.215. These admitted and clear-cut violations of the rules, standing alone, require that the petition for leave to amend be denied and the amendment rejected forthwith. Consideration of an engineering proposal which is patently defective and in violation of the rules would disrupt the orderly conduct of this proceeding. Erwin O'Connor.

WHEREFORE, in view of the foregoing, ORA requests that the Review Board deny the petition for leave to amend of Ringer and reject his amendment.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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May 18, 1994

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2.0 ALLOCATION CONSIDERATIONS

Channel 280 is allotted to Westerville, Ohio, in Section 73.202(b) of the FCC Rules as a Class A facility. Table 2.0 is an FM allocation study showing the actual and required separations between the facilities proposed herein and any applicable existing or proposed stations or allotments.

As shown in this table, the facilities proposed herein would be short spaced to two other stations:

WTTF-FM	Tiffin, OH	Channel 279B
WPAY-FM	Portsmouth, OH	Channel 281C

These short spacings are permitted under Section 73.215 of the FCC Rules, provided that the necessary contour protection is provided to these short spaced stations. The spacings to both of these stations comply with the requirements of Section 73.215(e) of the FCC Rules which specifies the minimum spacing which must be maintained when employing contour protection.

As outlined in Section 73.215 of the FCC Rules, to provide the required contour protection to WTTF-FM, there can be no overlap between the WTTF-FM 54 dBu 50% contour and the proposed 48 dBu 10% contour or between the proposed 60 dBu 50% contour and the WTTF-FM 54 dBu 10% contour. Likewise, to provide the required contour protection to WPAY-FM, there can be no overlap between the WPAY-FM 60 dBu 50% contour and the proposed 54 dBu 10% contour or between the proposed 60 dBu 50% contour and the WPAY-FM 54 dBu 10% contour. As outlined in Section 73.215(b) of the FCC Rules, the contour projections for WTTF-FM assume operation with an omnidirectional effective radiated power of 50 kilowatts at 150 meters above average terrain, the maximum facilities permitted for a Class B station. Those for WPAY-FM assume operation with an omnidirectional

effective radiated power of 100 kilowatts at 600 meters above average terrain, the maximum facilities permitted for a Class C station. Terrain data from the NGDC 30 second terrain database was utilized in projecting these contours. Tables 2.1(a) and 2.1(b) present the projections of the appropriate contours for WPAY-FM, assuming an antenna height of 822 meters above sea level. Likewise, Tables 2.2(a) and 2.2(b) present the projections of the appropriate contours for WTTF-FM, assuming an antenna height of 383 meters above sea level. Tables 2.3(a) through 2.3(c) present the projections of the appropriate contours for the facilities proposed herein. These contours are based upon the actual proposed operating facilities, including the directional antenna pattern detailed in Section 3.0 of this exhibit, and terrain data from the NGDC 30 second terrain database. Figure 2.0 shows all of these contours on an appropriate map base. As can be seen from an examination of this figure, the proposed operating facilities provide the required contour protection to WPAY-FM, and thus fully comply with Section 73.215 of the FCC Rules with regard to WPAY-FM.

This figure also shows that a small amount of overlap will occur between the proposed 48 dBu 10% contour and the 54 dBu 50% contour of WTTF-FM. The reference coordinates for the Westerville allotment fail to comply with the spacing requirements of Section 73.207 of the FCC Rules with regard to WTTF-FM. Accordingly, applicants for this channel are permitted to invoke the provisions of Section 73.213(c) of the FCC Rules with regard to WTTF-FM. This Rule Section permits operation with an effective radiated power of 3 kilowatts at 100 meters above average terrain, or equivalent, provided the spacing to WTTF-FM exceeds the 105 kilometer value specified in Section 73.213(c)(1) of the FCC Rules. As shown in Table 2.0, the proposed spacing to WTTF-FM is 112.18 kilometers. Further-

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 18th day of May, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Petition for Leave to Amend and Amendment" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

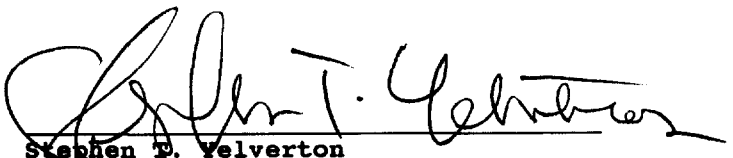
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